UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AECON BUILDINGS, INC., Plaintiff, v. ZURICH NORTH AMERICA, et al., Defendants.	Case No. C07-832MJP ORDER DENYING HARTFORD'S MOTION TO ESTOP AECON RE: ALLOCATION OF DAMAGES

This matter comes before the Court on Defendant Hartford Casualty Insurance Company's ("Hartford's") motion for an order applying the doctrine of judicial estoppel. (Dkt. No. 129.) Defendant requests that the Court restrict Plaintiff from claiming damages greater than those presented to this Court and the King County Superior Court in a declaration by Plaintiff's repair costs expert, Rocco Romero. Plaintiff opposes the motion. (Dkt. No. 164.) Having considered the motion and response, Defendant's reply (Dkt. No. 172), the documents submitted in support and the balance of the record, the Court DENIES Defendant's motion.

Background

The parties and the Court are familiar with the facts in this case and the Court need not repeat many of them here. In brief, this action arises from claims made by the Quinault Indian Nation ("the Quinault") against Aecon Buildings, Inc. ("Aecon") regarding the construction of a casino and hotel project in Ocean Shores, Washington. Aecon was the general contractor for the project. Chinook Builders, Inc. ("Chinook") was one of the subcontractors Aecon hired to work on the project. Construction commenced in May 1998 and was substantially completed on June 9, 2000. (Dkt. No. 134, Blood Decl., Ex. 1 at ZC 000665.) In April 2004, the Quinault contacted

Aecon alleging defects in the building structure that is part of the Quinault project. In May 2005, Aecon sued the subcontractors in King County Superior Court. See Aecon v. Vandermolen Const., Cause No. 05-2-03044-5 SEA. Aecon did not initially sue Chinook, but amended its complaint on June 7, 2006, to include claims against Chinook. (Dkt. No. 92, Ex. 6.) In May 2006, Aecon also tendered the Quinault's claims to Chinook and its insurer, Hartford, who had added Aecon as "Additional Insured" under its policy. Hartford refused to defend or cover Aecon. Aecon partially settled the Quinault's claims in early June 2006 for approximately $1.9 million and fully and finally resolved the dispute on January 31, 2007, for $3.75 million after a final mediation proceeding. (Dkt. No. 105-10, 105-14.) Aecon initiated this suit in April 2007, claiming that Hartford breached its duty to defend and indemnify Aecon, breached its duty to act in good faith, violated the Washington Consumer Protection Act, and acted negligently.[1] (Dkt. No. 3, Compl. at 25-26.)

In September 2006, the superior court entered default against Chinook as to all claims and damages specified in Aecon's complaint against Chinook. (Dkt. No. 164, Martens Decl., Ex. 1.) In March 2007, the superior court ruled on a summary judgment motion brought by the defendants that Aecon must "(1) provide an expert declaration with an allocation of damages to each defendant on or before March 22, 2007, to be followed by (2) a 30(b)(6) deposition regarding Plaintiff's Allocation of Damages on March 23, 2007, and (3) defendants may continue discovery on damages until the time of trial." (Id., Ex. 2.) Aecon then asked its expert, Rocco Romero, to produce an allocation for the remaining parties in the litigation excluding any parties that were in default or with whom Aecon had previously settled. (Martens Decl. ¶ 2; Romero Decl. ¶ 4.) Because Chinook was in default, Aecon did not ask Mr. Romero to prepare an allocation that included damages attributable to Chinook. (Martens Decl. ¶ 2; Romero Decl. ¶ 4.) On March 21, 2007, Mr. Romero presented a report to the superior court that made the following allocations:

[1] Aecon also sued another subcontractor's insurer in this action.

- Britco: 70.52%
- Aecon 12.01%
- Western Partitions 10.20%
- Vandermolen 6.10%
- CPC/Lupo 1.06%

(Romero Decl., Ex. B.) Thus, Mr. Romero allocated 99.89% of the loss to the remaining parties in the case, who did not include Chinook.

In September 2007, Aecon moved in the superior court for a determination of the reasonableness of its settlement with the Quinault. Aecon included Mr. Romero's report with the documents supporting its motion. (See Dkt. Nos. 43-1, 43-5.) The court denied the motion on procedural grounds, ruling that "the court does not have authority under RCW 4.22.060 to determine the reasonableness of the settlement between Quinault and Aecon because that proceeding was never before this court." (Dkt. No. 43-8.) The superior court denied Aecon's motion for reconsideration on the issue. (Dkt. No. 43-12.)

In February 2008, Aecon moved for default judgment in the underlying action against Chinook for over $1.3 million in damages plus fees and costs. In an order dated March 4, 2008, the superior court denied the motion, finding that "damages have not been allocated to Chinook's breach of contract. Attorney fees and costs have not been allocated to those attributable to Chinook's breach of contract or indemnity obligation." (Dkt. No. 164-2, Martens Decl., Ex. 1.) In response, Aecon had its expert, James Paustian, prepare an allocation. (Id., Ex. 3.) In his report, Mr. Paustian estimates the cost to repair the deficiencies and damage related to Chinook's work at $1,185,212. (Id.) Aecon also submitted an allocation of its attorneys' fees and costs based upon the contractual indemnity provisions of its subcontract agreement with Chinook and the proportional liability of Chinook. (Id.) Hartford has informed this Court that, as of July 17, 2008, the superior court had not yet ruled on the motion for entry of default judgment, but had requested that Chinook respond to Aecon's computation. (Reply at 2.)

Also in March 2008, Aecon filed a motion in this action requesting that the Court determine the reasonableness of the Quinault-Aecon settlement. (Dkt. No. 42.) Included with

the materials filed were the materials Aecon had filed in support of its motion for a reasonableness determination in superior court. Thus, Aecon included, among the hundreds of pages of materials it filed on this issue, the report prepared by Mr. Romero. (Dkt. No. 43-5 at 93.) On April 29, the Court denied the motion, concluding that, in light of the superior court's ruling on the matter, collateral estopped precluded the Court from making a reasonableness determination of the Quinault-Aecon settlement. (Dkt. No. 70.) The Court did not consider whether the settlement is actually reasonable or not.

Hartford now moves for an order applying the doctrine of judicial estoppel to restrict Aecon's claimed allocation of damages to that presented by Mr. Romero. That is, Hartford asks this Court to prohibit Aecon from allocating any damages to Chinook.

Discussion

The Washington Supreme Court recently described the doctrine of judicial estoppel and the elements to be considered in determining whether it should be applied:

> Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. The doctrine seeks to preserve respect for judicial proceedings, and to avoid inconsistency, duplicity, and ... waste of time. . . .
>
> Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. These factors are not an exhaustive formula and additional considerations may guide a court's decision. Application of the doctrine may be inappropriate when a party's prior position was based on inadvertence or mistake.

Arkinson v. Ethan Allen, Inc., 160 Wn.2d 535, 538-39 (2007) (internal citations and quotation marks omitted). Other factors to consider include the following:

> (1) [t]he inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change.

Markley v. Markley, 31 Wash.2d 605, 614-15 (1948), cited with approval in Arkinson, 160 Wn.2d at 539.

Considering all of these factors here, the Court concludes that application of the doctrine of judicial estoppel would be inappropriate. First, Aecon's presentation here of Mr. Paustian's report calculating damages attributable to Chinook is not "clearly inconsistent" with its presentation of Mr. Romero's report allocating damages among the underlying case's litigating defendants. The two reports respond to different questions — one addresses the percentage allocation of damages among a certain subset of defendants (that did not include Chinook) and the other calculates a dollar amount of damages attributable only to Chinook. Second, acceptance of Mr. Paustian's testimony in this case will not create the perception that this Court or the superior court has been misled. Not only have the two courts not issued any opinions actually relying on Mr. Romero's report, it is apparent that Mr. Romero's report does not address at all whether any damages should be attributable to Chinook. Third, there is no injustice in allowing Aecon to present its damages claim through the testimony of Mr. Paustian. Neither Chinook nor its insurer could have plausibly believed that Aecon was not seeking any damages attributable to Chinook, either in the underlying case or in this one. Why else would Aecon sue Chinook in the underlying action and seek a default judgment against it? Chinook and Hartford have not been misled.

Because Aecon does not seek an advantage through the taking of an inconsistent litigation position, application of the doctrine of judicial estoppel is not warranted. Hartford's motion on this issue is DENIED.

To the extent that Hartford's motion raises the tangential issue of whether the Quinault-Aecon settlement is the presumptive measure of damages against the insurers in this action (who the Court has already ruled handled Aecon's tender in bad faith), that issue has not been fully briefed in this motion by all parties and therefore will not be decided at this time.

The clerk is directed to send copies of this order to all counsel of record.

Dated: August 19th, 2008.

Marsha J. Pechman
United States District Judge